

**In the United States Bankruptcy Court
for the
Southern District of Georgia
Savannah Division**

In the matter of:

DANIEL L. ABEL
(Chapter 7 Case 92-41908)

Debtor

DANIEL L. ABEL

Plaintiff

v.

GEORGIA DEPARTMENT
OF REVENUE

Defendant

Adversary Proceeding

Number 93-4126

FILED

at 2 O'clock & 06 min. PM

Date 1-24-94

MARY C. BECTON, CLERK
United States Bankruptcy Court
Savannah, Georgia



**MEMORANDUM AND ORDER
ON MOTION FOR SUMMARY JUDGMENT**

Debtor, Plaintiff herein, instituted this proceeding on August 18, 1993.

The Georgia Department of Revenue, Defendant and Movant herein, timely filed its

Answer on September 20, 1993. On November 19, 1993, Defendant filed a Motion for Summary Judgment. Plaintiff has not filed a response to the Motion for Summary Judgment.

FINDINGS OF FACT

Rule 6.6 of the Local Rules of the United States Bankruptcy Court for the Southern District of Georgia provides as follows:

Upon any motion for summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure, in addition to the brief, there shall be annexed to the motion, a separate, short and concise statement of the material facts as to which it is contended there exists no genuine issue to be tried as well as any conclusions of law thereof. *All material facts set forth in this statement required to be served by the moving party will be deemed to be admitted unless controverted by the statement required to be served by the opposing party.* Response to a motion for summary judgment shall be made within 20 days of service of the motion.

Local Rule 6.6 of the United States Bankruptcy Court for the Southern District of Georgia (emphasis added). The certificate of service in the file indicates that Defendant's Motion for Summary Judgment, Memorandum of Law, Affidavit of

Rebecca Pearson, and Statement of Material Facts was served upon Debtor's attorney on November 17, 1993. To date, Debtor has not filed a response to Defendant's Motion. Therefore, pursuant to Rule 6.6, Defendant's Statement of Material Facts As To Which There Exists No Genuine Issue are deemed admitted in this case.

Accordingly, the following facts are not in dispute:

The Debtor filed a petition for relief under Chapter 13 of the Bankruptcy Code on September 18, 1992. On June 2, 1993, the Debtor converted his case to Chapter 7. On August 18, 1993, the Debtor filed the instant action to determine the dischargeability of his 1983, 1984, 1985, 1986, 1987, and 1988 state income tax liabilities. As of September 18, 1992, the date upon which Debtor filed a petition under Chapter 13 of the Code, Debtor had not filed Georgia income tax returns for the tax years of 1983, 1984, 1985, 1986, 1987, and 1988.

CONCLUSIONS OF LAW

Bankruptcy Rule 7056 incorporates Fed.R.Civ.P. 56, which provides that summary judgment "shall be rendered forthwith if the pleadings, depositions,

answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed.R.Civ.P. 56(c).

The moving party bears the initial burden of showing the absence of any genuine issue of material facts. Bald Mountain Bank, Ltd. v. Oliver, 863 F.2d 1560 (11th Cir. 1989). The movant should identify the relevant portions of the pleadings, depositions, answers to interrogatories, admissions, and affidavits to show the lack of a genuine issue of material fact. Celotex Corp. v. Catrett, 477 U.S. 317, 323, 106 S.Ct. 2548, 2553, 91 L.Ed.2d 465 (1986). The moving party must support its motion with sufficient evidence and "demonstrate that the facts underlying all the relevant legal questions raised by the pleadings or otherwise are not in dispute . . . ". United States v. Twenty (20) Cashier's Checks, 897 F.2d 1567, 1569 (11th Cir. 1990) (quoting Clemons v. Dougherty County, Ga., 684 F.2d 1365, 1368-69 (11th Cir. 1982)).

Once the movant has carried its burden of proof, the burden shifts to the non-moving party to demonstrate that there is sufficient evidence of a genuine issue of material fact. United States v. Four Parcels of Real Property, 941 F.2d 1428, 1438 (11th Cir. 1991). The non-moving party must come forth with some evidence to

show that a genuine issue of material fact exists. United States v. Four Parcels of Real Property, 941 F.2d at 1438. The trial court should consider "all the evidence in the light most favorable to the non-moving party." Rollins v. Tech South, Inc., 833 F.2d 1525, 1528 (11th Cir. 1987).

Since Plaintiff has not offered any response to Defendant's motion, the issue in this case is narrowed to whether Defendant has carried its initial burden of proving that there is no genuine issue of material fact and that judgment is appropriate as a matter of law. If Defendant has carried this burden, then summary judgment in favor of Defendant is appropriate.

11 U.S.C. Section 523(a)(1)(B)(i) provides:

A discharge under section 727 . . . of this title does not discharge an individual debtor from any debt for a tax or customs duty with respect to which a return, if required, was not filed.

Courts which have applied this provision have uniformly held that any tax liability, for which a return was required but not filed, is nondischargeable in a Chapter 7 case.

See Matter of Crawford, 115 B.R. 381, 383 (Bankr. N.D.Ga. 1990); In re Hoffman, 76 B.R. 853 (Bankr. S.D.Fla. 1987); In re Haywood, 62 B.R. 482, 485 (Bankr. N.D.Ill. 1986). As the Court in Haywood stated:

The language of the statute is clear. An individual's debt arising as the result of tax for which the debtor was required to file a return is nondischargeable if the debtor did not file that return.

In re Haywood, 62 B.R. at 485. Moreover, such tax debts are nondischargeable without regard to the length of time which the taxing body has had to collect the taxes. Id.

Under Georgia law, a taxpayer is required to file annual income tax returns. O.C.G.A. §§48-7-50 & 56. It is undisputed that the Debtor did not file state income tax returns for 1983, 1984, 1985, 1986, 1987, and 1988 as of the petition date. I therefore conclude that Defendant's Motion for Summary Judgment must be granted so that Debtor's state income taxes arising from the tax years 1983, 1984, 1985, 1986, 1987, and 1988 are excepted from discharge.

ORDER

Pursuant to the foregoing Findings of Fact and Conclusions of Law,
IT IS THE ORDER OF THIS COURT that Defendant's Motion for Summary
Judgment is hereby granted. Debtor's Georgia state income tax liability for the years
1983, 1984, 1985, 1986, 1987, and 1988 is excepted from discharge.



Lamar W. Davis, Jr.
United States Bankruptcy Judge

Dated at Savannah, Georgia

This 21st day of January, 1994.